Westminster, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

T. ITO & SONS FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 83-CE-200-EC 11 ALRB No. 36

DECISION AND ORDER
SETTING ASIDE ELECTION

This is a technical refusal to bargain case. The underlying election petition was filed on March 29, 1982,[1/] and a 48-hour strike election was held on March 31. The tally of ballots showed the following results:

UFW	212
No Union	121
Unresolved Challenged Ballots	18
Void Ballots	7
Total	358

T. Ito & Sons Farms (Employer/Respondent) filed 38 election objections, 23 of which were set for hearing. The Investigative Hearing Examiner (IHE), Beverly Axelrod, categorized the

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[1/] Unless otherwise noted, all date references herein are to 1982.

Employer's objections into four general groups,[2/] and after evaluating the evidence in support thereof, recommended dismissing the objections and certifying the election results. The Agricultural Labor Relations Board (ALRB or Board) adopted her Decision in its entirety. (See T. Ito & Sons Farms (1983) 9 ALRB No. 56.)

In issuing a complaint against Respondent for its refusal to bargain, the General Counsel argues that Respondent's litigation posture is reasonable and in good faith. The General Counsel therefore opposes the imposition of the makewhole remedy. The Charging Party, United Farm Workers of America, AFL-CIO (UFW or Union), excepts to the General Counsel's failure to request makewhole. Respondent's contention is that the certification is invalid. Respondent requests the Board to reconsider the Decision in 9 ALRB No. 56, and set aside the election, or in the alternative, to find that its litigation posture is reasonable and in good faith, rendering makewhole inappropriate.

RECONSIDERATION OF ELECTION DECISION

Initially, we address the question of whether the Board

[2/] The four general categories are:

a) The election petition was not properly filed in the regional office;
b) The Board agents had no credible basis for determining that a majority of employees were on strike;
c) UFW agents and supporters coerced and frightened employees, before and during the election, into voting for the UFW; and
d) Board agents failed to conduct the election proceedings properly, failed to police the quarantine area, manipulated the challenged ballots to favor pro-UFW voters and told voters to vote for the UFW.

should reconsider its Decision in the underlying representation case, as requested by Respondent. Early on, the ALRB adopted the National Labor Relations Board's (NLRB or national board) proscription against the relitigation of election-related issues during the technical refusal-to-bargain proceeding, absent newly discovered or previously unavailable evidence. (See, e.g., Sunnyside Nurseries, Inc. (1979) 5 ALRB No. 23, overruled on other grounds (1st Cir., Div. 3, 1981) 1 Civ. 46725.) Recently in Subzero Freezer Co., Inc. (1984.) 271 NLRB No. 7 [116 LRRM 1281], the NLRB vacated an earlier certification and dismissed a complaint alleging a refusal to bargain. Its reversal was based upon its adoption of the position taken by dissenting Chairman Dotson and Member Hunter in the underlying representation case, namely that misconduct occurred which resulted in an atmosphere of fear and reprisal and prevented a free and fair election. In dissenting to the reversal, Member Zimmerman, while conceding that the majority had authority to reconsider its earlier representation decision, argued against the wisdom of doing so, noting that the need for stability and finality in litigation required that representation issues, having been once litigated, should not be relitigated merely because of a change in the composition of the Board. In response, the majority stated:

> While we share our dissenting colleague's concern with stability in law and finality in litigation, at the same time we believe that the just resolution of questions presented to the Board is our primary duty. Therefore while reconsideration of issues in technical refusal-to-bargain cases, may, in some instances, cause delays or involve changes in Board law, we are not

> willing to grant a Motion for Summary Judgment that would result in an order requiring an employer to. bargain with a union that has not attained the status of majority representative from a free and fair election.
> (271 NLRB No. 7, slip op. at p. 3.) [3/]

As will be explained below, because we conclude that the election in this case was conducted in an atmosphere of fear and coercion, we hold that this case appropriately falls within the exception established in Subzero Freezer Co., Inc., supra, 271 NLRB No. 7, to the general rule proscribing relitigation of representation issues at the technical refusal-to-bargain stage. [4/] Accordingly, we set aside the election.

Atmosphere of Fear and Coercion

In her Decision, the IHE found that on Saturday, March 27, workers in foreman Miguel Rodriguez' crew at the Katella field engaged in a work stoppage for a pay increase. After Bill Ito, Respondent's general manager, sent home the Rodriguez crew for the day, approximately 40 members of the crew then went to the Walker field and yelled at the workers there to stop working. When some of the Katella workers tried to enter the field to

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[3/] The ALRB has itself reconsidered election-related issues at the technical refusal-to-bargain stage, even in the absence of newly discovered evidence. (See Sutti Farms (1981) 7 ALRB No. 42; Triple E Produce Corp. (1980) 6 ALRB No. 46, (reversed on other grounds) Triple E Produce Corp. v. ALRB (1983) 35 Cal.3d 42.)

[4/] Neither of our dissenting colleagues presents any persuasive arguments for not relying on Subzero Freezer Co., Inc., supra, 271 NLRB No. 7. In particular, Member Henning relies upon minor, meaningless differences between the two cases and totally ignores the major similarity: The underlying election case was conducted in an atmosphere of fear and coercion.

talk to the Walker crew, Ito told them to stay out. Ito then decided to send the Walker workers home also.

The IHE failed to either credit or discredit the testimony of employees Anita Jaime or Jesus Diaz[5/] concerning threats made to the workers at the Walker field incident. Anita Jaime testified that the Katella workers swore and yelled at them to get out of the field so that the boss would pay more, and that if the workers didn't leave the field they would call the Immigration and Naturalization Service (hereinafter INS or immigration service) on them or beat them out. (Tr. VII:57; VIII:64.) Jesus Diaz testified that the group also swore at them and threatened to call the immigration service or beat them. Both Jaime and Diaz estimated that 80 to 90 workers were working in their crew.[6/]

The IHE found that later in the day, a group of approximately 70 workers (some from Katella and some from Walker) drove to Respondent's Irvine field. The striking workers stopped along the road and yelled at the Irvine workers to stop working

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[5/]Jesus Diaz testified that his, foreman is Miguel Rodriguez, foreman of the Katella field workers. However, from his testimony, it is apparent he was working at the Walker field on Saturday since his testimony related to a group of workers arriving to yell at employees to leave work.

[6/]The threats to call the immigration service or to beat up workers were similar to threats found to have occurred on other occasions. Hence we rely on them. (See Westwood Horizons Hotel (1984) 270 NLRB 802 [116 LRRM 1152], p. 802, fn. 4.) The IHE sustained an objection to Diaz' testimony that he felt bad about the threat of calling the immigration service and that many employees were scared. (Tr. III:19.) There was testimony that the Immigration and Naturalization Service (INS) raided the Employer's property the previous Monday and arrested some workers. (Tr. III:21; V:141.)

and cursed those who remained. The IHE credited testimony that some of the striking workers picked up rocks while they were yelling, but found that none were thrown.

Bill Ito and foreman Marciano Figueroa testified that approximately 70 to 80 workers were working at the Irvine field that afternoon. Although the IHE made findings that curses were made and that strikers held rocks in their hand, she did not specify the source of the testimony. It is clear, however, that the findings were based upon the testimony of foreman Marciano Figueroa. Figueroa testified that the strikers swore at the workers, grabbed sticks and rocks, and threatened to beat them and call the immigration service if they did not get out. (Tr. I:107-113.) Juana Hernandez similarly testified that the strikers yelled that they would get them out and that she was afraid to go back to work because of the threats. (Tr. VIII:72.)

The IHE also credited the testimony of Figueroa and Ito that strikers led by worker Alvaro Vasquez blocked vans inside the Irvine field. Fifteen to sixteen workers were inside Figueroa's van when Vasquez blocked their exit and ordered the workers off the bus. Vasquez told Figueroa that he did not want him to come back to work the next day. When Figueroa explained that he had to work to pay debts, Vasquez warned him that if anything happened to him during work, he (Figueroa) would have to bear the consequences because he had already been warned. (Tr. I:116.) Figueroa then drove a short distance to the entrance of the field where a group of 25 to 30 strikers was blocking the exit and screaming at him. All of the workers in Figueroa's

crew were still on the ranch and within 20 yards of the entrance, their exit blocked by the strikers. (Tr. I:121.) The workers let Figueroa through when one of the strikers interceded on his behalf.

Bill Ito testified that he was advised by a worker who could not drive his van out of the field that the strikers were blocking the road. Ito went to the van and tried to drive it out but about 10 of the strikers blocked him. There were 10 to 15 workers inside the van who jumped out. The strikers told him that the Irvine people could not leave the field. Ito testified that Alvaro Vasquez came up to him while he was still inside the van and swung a stick at him. Vasquez kept swinging the stick over his (Vasquez') head. Although Vasquez denied having a stick in his hand while he argued with Ito, the IHE discredited his denial; however, the IHE credited Ito's testimony that he was not really concerned about his safety. (Tr. I:29-35.) Ito testified that there were about 50 workers around his van when this incident occurred. The matter ended when Ito agreed to hold *a* meeting with the workers the next day.

On Monday, March 29, a large group of strikers gathered at the Katella field where approximately 50 to 70 workers were working in the field. A smaller group of 10 to 15 workers shouted and cursed at the employees, threatened to call the INS on them, and challenged them to come out of the field and fight. In addition, workers Jesus Diaz, Gerardo Nunez, Francisco Ruiz and Jose Gascon testified that the strikers threatened to beat them up or damage their cars. (Tr. III:30; V:125; VI:121; VI:89.)

A group of four strikers punctured a tire of one of the nonstriker's vehicles parked at the edge of the field.

None of the strikers participating in the above incidents wore Union buttons or other union insignia. It is unclear whether the Union was called on Sunday or Monday, but the evidence showed that the Union did not arrive at the Employer's premise until Monday afternoon, March 29. It appears that the employees' strike was initially aimed at securing a pay raise, but turned into a campaign for the Union on Monday afternoon. Once the Union arrived, it quickly gathered authorization cards and filed an election petition at the end of the day on Monday.

The IHE found that during the election on Wednesday, March 31, small groups of union supporters, wearing union buttons, continually entered and left the quarantine area and campaigned among prospective voters. The IHE failed to account for the testimony of various witnesses to the effect that while they were waiting in line to vote, the campaigning union supporters threatened them. Thus, Mauricio Bernal testified that one of the union supporters, Alfonso Alejandres, who was not in line to vote, approached him and stated that if he did not support the Union, they were going to fire him from his job and report him to the immigration service. The same group of union supporters, including Alejandres, continued to talk to other workers arriving to vote. (VI:62.) Jose Gascon testified that a group of 6 or 7 UFW supporters, including Alfonso Alejandres, approached him and about 80 other workers waiting to vote and

told them to support them or they would call the INS. (VI:91.) Francisco Ruiz, a company observer, testified that he heard union supporter Juana Barrera tell his wife to vote for the Union because if she didn't, they were going to get the Immigration and Naturalization Service after her and, if the Union won, she would lose her job. (VI:134.) Juan Vallejo, another company observer, testified that he also heard Juana Barrera make threats about the INS to each group that arrived to vote, in all 6 or 7 times during the election.[7/]

Analysis

The California Supreme Court, in Triple E Produce Corp. v. ALRB (1983) 35 Cal.3d 42, noted that although the NLRB employs the "laboratory conditions" standard in reviewing the conduct of an election and the ALRB utilizes the "outcome-determinative" test, both employ the same standard for evaluating the impact of violence or threats thereof on the election process. Thus the NLRB and ALRB will set aside an election only when the misconduct involved creates an atmosphere of fear or coercion (or reprisal) rendering a free choice of representatives impossible. (See Patterson Farms (1976) 2 ALRB No. 59; Steak

[7/]There was testimony by UFW witnesses that no campaigning or threats occurred either at the fields or during the election. However given the IHE's specific findings that similar threats were made and that campaigning during the election did occur, these general denials are not entitled to much weight. In any event, the failure of the ALJ to discredit the testimony of the four witnesses as to the threats about calling the INS, and the fact that testimony concerning similar threats made prior to the election was credited by the IHE, leads us to conclude that the testimony about the election-day threats ought to be credited. (See Westwood Horizons, supra, 270 NLRB 802, fn, 4.)

House Meat Co. (1973) 206 NLRB 28 [84 LRRM 1200].)[8/]

Where the misconduct found to have been committed is not attributable to any union official, organizer, or agent, but rather is attributable to union supporters or workers in general, both the ALRB and NLRB give less weight to it than is given to misconduct attributable to the parties. (See San Diego Nursery Co., Inc. (1979) 5 ALRB No. 43, Takara International (1977) 3 ALRB No. 24; Sonoco of Puerto Rico, Inc. (1974) 210 NLRB 493 [86 LRRM 1112].)[9/] The test used to review such nonparty conduct is whether it is so aggravated that it creates a general atmosphere of fear or reprisal rendering employee free choice impossible. (See Pleasant Valley Vegetable Co-op (1982) 8 ALRB No. 82; Central Photocolor Co. (1972) 195 NLRB 839 [79 LRRM 1568], Seaward International (1985) 275 NLRB No. 130 [119 LRRM 1217] .)[10/]

Whether a statement is coercive does not turn on an

[8/]Thus it is not surprising that ALRB decisions dealing with threats and violence cite standard NLRB cases for precedent bearing on the question of whether there exists an atmosphere of fear and coercion. (See Patterson Farms, supra, 2 ALRB No. 59; Joseph Gubser Co. (1981) 7 ALRB No. 33; Frudden Enterprises, Inc. (1981) 7 ALRB No. 22; A & D Christopher Ranch (1981) 7 ALRB No. 31 (overruled on other grounds,(1st Cir.,Di v.3, (1985) A020605); J. Oberti, Inc. (1984) 10 ALRB No. 50.)

[9/]The persuasive reasons for this policy are well summarized in NLRB v. ARA Services (3rd Cir. 1983) 717 F.2d 57 [114 LRRM 2377, 2383], See also Clothing & Textile Workers v. NLRB (DC Cir. 1984) 736 F.2d 1559 [117 LRRM 2453, 2457].

[10/]Both NLRB and ALRB cases stress that where an atmosphere of fear and coercion exists, the fact that the misconduct is not attributable to the union is irrelevant. (RJR Archer, Inc. (1985) 274 NLRB No. 49 [118 LRRM 1513]; Patterson Farms, supra, 2 ALRB No. 59.)

employee's subjective reaction but instead depends upon whether the statement reasonably tends to coerce an employee. (See Triple E Produce Corp. v. ALRB, supra, 35 Cal.3d 42; G. H. Hess, Inc. (1949) 82 NLRB 463 [23 LRRM 1581].) Once a threat has been established, whether it constitutes aggravated misconduct depends upon the character and circumstances of the threat, and not merely on the number of employees threatened. (See Patterson Farms, supra, 2 ALRB No. 59; Steak House Meat Co., supra, 206 NLRB 28; Central Photocolor, supra, 195 NLRB 839.)

On many occasions, the NLRB has found that threats of physical beatings or of violence by nonparty union adherents can establish an atmosphere of fear and coercion.[11/] (Poinsett Lumber Manufacturing Co. (1956) 116 NLRB 1732 [39 LRRM 1083]; Steak House Meat Co., Inc., supra, 206 NLRB 28.) In Poinsett Lumber there were four separate incidents of threats by union supporters, including two involving threats of physical beatings. The NLRB stated that "threats of personal retaliation and of physical violence made to employees and the concomitant coercive effect thereof, constituted such serious conduct as to interfere with a free and untrammeled choice of representatives contemplated by the Act." (116 NLRB at 1739.)[12/]

[11/] Where actual violence occurs, an atmosphere of fear and coercion is readily established. (See Al Long, Inc. (1968) 173 NLRB 447 [69 LRRM 1366]; Ciervo Blanco, Inc. (1974) 211 NLRB 578 [86 LRRM 1452]; Phelan and Taylor (1976) 2 ALRB No. 22.)

[12/] See also the following NLRB cases wherein the NLRB found an atmosphere of fear or coercion established by the actions

(fn. 12 cont. on p. 12.)

A recent NLRB decision is illuminating. In Westwood Horizons Hotel, supra, 270 NLRB 802, about two weeks before an election, Marcial, a pro-union employee, told employee Luna, in the presence of three pro-union employees and two or three other employees, that he would beat up Luna if he did not vote for the union. Marcial also threatened to beat up employees Garcia and Fuentes (who were not present) and any other employee who did not vote for the union. One of the other pro-union employees, Naharo, repeated the same threat. Luna replied he was with them and would vote for the union so he would not be beaten up. On election day, Marcial approached Garcia, one of the employees he had threatened to beat up, and told him to go vote. When Garcia said he would vote later, Marcial told him he had to go with him immediately, grabbed his arm and held it during the five minute walk to the voting area. Naharo told one of the 15 voters waiting to vote that Marcial had used force to bring Garcia. Several of the employees waiting in line began talking about it and Marcial just laughed. Marcial then took Garcia to the front of the voting line and the two voted.

(fn. 12 cont.)

of union supporters: Diamond State Poultry Co., Inc. (1953) 107 NLRB 3 [33 LRRM 1043]; Audiovox West Corp. (1978) 234- NLRB 428 [97 LRRM 1388]; Sonoco of Puerto Rico, Inc., supra, 210 NLRB 493.

(See also NLRB v. Claxton Mfg. Co. (5th Cir. 1980) 613 F.2d 1364 [103 LRRM 2980]; Hickman Harbor Service v. NLRB (6th Cir. 1984) 739 F.2d 214 [116 LRRM 3119]; NLRB v. Van Gorp Corp. (8th Cir. 1980) 615 F.2d 759 [103 LRRM 2766]; Zieglers Refuse Collectors, Inc. v. NLRB (3rd Cir. 1981) 639 F.2d 1000 "L106 LRRM 2331].)

After he voted, Marcial and three other pro-union employees went to get Fuentes, another of the employees he had threatened earlier. Again they told Fuentes to go vote, and when Fuentes explained he was still working, Marcial told him he would go immediately with them or by force. Fuentes went with them. While waiting in line to vote along with Luna (also threatened 2 weeks earlier) and 10 other employees, Marcial and 6 other pro-union employees who had already voted stood on both sides of the line, repeating "vote for the union." This activity continued for three minutes until a board agent came to the doorway of the voting room and told the employees to leave. The pro-union employees left for *a* few seconds, but returned and continued the activity outside the voting room for 10 minutes.

In overruling the hearing officer's conclusion that the threats were not serious, the NLRB explained the test it utilizes:

> In determining the seriousness of *a* threat, the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out and whether it is likely that employees acted in fear of his capability of carrying out the threat; and whether the threat was "rejuvenated" at or near the time of the election.
> (Westwood Horizons Hotel, supra, 270 NLRB 802, 803. Footnotes omitted.)

The NLRB found in Westwood Horizons Hotel that the threats, when considered with other misconduct on the day of the election, did create a general atmosphere of fear and reprisal that interfered with the election:

> Marcial and Naharo threatened to beat up not only employees Garcia, Fuentes, and Luna, but also any other employee within the bargaining unit who decided not to vote for the Union. These threats were disseminated to some extent within the unit, because two or three employees, not shown to be union adherents, were present when the threats were made.
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> On election day, Marcial and other prounion employees rejuvenated the threats by physically taking Garcia to the voting area and by forcing Fuentes to vote and telling him to vote for the Union, even though, as Fuentes later testified, he did not want to vote at all. Not only were Garcia and Fuentes likely to be intimidated by such conduct, but so also were the 15 other employees waiting in line to vote who saw Marcial bring Garcia to the voting area and heard prounion employee Naharo tell one of the employees waiting in line to vote that Marcial had used force to bring Garcia to the voting area. Marcial and six union adherents further intimidated Fuentes, Luna, who was standing in line behind Fuentes, and the 10 other employees waiting in line to vote by continually repeating for about 10 minutes that the employees should vote for the Union.
> (Westwood Horizons Hotel, supra, 270 NLRB 802, 803. Footnotes omitted.)

Utilizing the test enunciated in Westwood Horizon Hotel, it is clear that an atmosphere of fear and coercion existed in this case. The threats here involved not only physical beatings, as in Westwood, but also threats to call the INS. The threats were directed at large groups of the employer's work force --between 150 and 170 workers on Saturday, March 27, (80 to 90 workers at Walker; 70-80 workers at Irvine), and between 70 and 80 workers at the Katella field on Monday, March 29. The threats were widely disseminated within the work force in that most workers were witnesses to the threats, either as strikers or as workers in the Katella, Walker and Irvine fields. Clearly the strikers had the ability to carry out their threats of

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physical beatings and calling the INS.[13/] Indeed, the strikers demonstrated at the Irvine field that they were serious and capable of carrying out their threats by holding rocks in their hands while yelling at workers, by blocking vans driven by foreman Figueroa and general manager Bill Ito, by forcing the 10 to 15 employees in each van to get off, by one worker swinging a stick at Bill Ito while he argued with him in front of 50 workers,[14/] and by blocking the workers' exit from the field. On Monday, March 29, strikers again threatened workers and a tire of a worker's car was punctured. The threats and the incidents enumerated above are the kind that would reasonably tend to coerce employees.

As in Westwood, the threats and incidents were very close to the time of the election and recurred (were rejuvenated) during the voting itself when small groups of union supporters continuously campaigned among voters standing in line to vote amidst threats of calling the INS or of employees losing their jobs if they did not vote for the Union. Although there was no evidence that the threats of physical beatings were repeated by the strikers during the campaigning at the voting site, the workers standing in line who heard the threats of INS raids or

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[13/] But see Blue Island Newspaper Printing, Inc. (1985) 273 NLRB No. 208 [118 LRRM 1245] .)

[14/] Although the IHE credited Bill Ito's testimony that he was not really concerned about his physical safety during the incident, Ito's subjective reaction is irrelevant to a determination as to whether Vasquez ' actions would reasonably tend to coerce the 50 employees who witnessed the incident or those who may have heard about it. (See Triple E Produce Corp., supra, 35 Cal . 3d 42.)

job loss were not likely to forget that these same threats were accompanied previously by threats of beatings made by the strikers just days before.

The threats of physical beatings and calling the INS in this case were not trivial, lightly taken, ambiguous, or outside the abilities of the speakers to carry out, factors which the NLRB or federal courts of appeals have considered in not finding statements coercive.[25/] Nor can the threats in this case be considered noncoercive on the basis that they are common language or expressions of temper which employees can evaluate as partisanship. (See NLRB v. Bostik, supra, 517 F.2d 971; Owens-Corning Fiberglas Corp. (1969) 179 NLRB 219 [69 LRRM 1288].) Central, to these cases is the isolated nature of incidents and/or the lack of any serious violence accompanying the statements. In this case, the threats were widespread, directed at a large portion of the voting unit (i.e., nonstrikers), repeatedly made, accompanied by some acts of force, arid made during the time workers were waiting in line to vote, all with the purpose of coercing workers to join the strike or, on the day of the election, to vote for the Union.

Several ALRB cases dealing with strike misconduct prior to an election" are distinguishable. In A & D Christopher Ranch,

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[15/](ATR Wire and Cable (1983) 267 NLRB 204 [114 LRRM 1006]; American Wholesalers, Inc. (1975) 218 NLRB 292 [89 LRRM 1352]; Urban Telephone Corp. (1972) 196 NLRB 23 [79 LRRM 1625]; NLRB v. Bostik (6th Cir. 1975) 517 F.2d 971 [89 LRRM 2585]; Tunica Mfg. Co. (1970) 182 NLRB 729 [76 LRRM 1535]; Beaird Poulan Div. (1980) 247 NLRB 1365 [103 LRRM 1389]; Central Photocolor, Inc., supra, 195 NLRB 839.)

supra, 7 ALRB No. 31 (overruled on other grounds, (1st Cir., Div. 3, (1985) A020605) an incident in which a woman threw a garlic head at a labor contractor in a field was found to be de minimis where the picketing was otherwise a peaceful plea for support. Another incident in which strikers blocked the entrance to a labor camp in order to prevent nonstrikers from working was unaccompanied by threats or violence. In the instant case, the incidents and threats were not isolated or peaceful. J. Oberti, Inc. (1984) 10 ALRB No. 50 is similarly distinguishable in that strikers entering olive fields were generally peaceful and nonthreatening, and ladders were shaken merely to get workers' attention rather than to threaten them.

In Joseph Gubser Co., supra, 7 ALRB No. 33, a field rushing incident occurred three weeks before the election. Dirt clods were thrown, the general manager was hit by a worker with a flag, and a tractor driver suffered a cut next to his eye from a thrown rock, necessitating 11 stitches. Only nine workers were working at the time of the incident and there was no competent evidence that the incident became widely known to other employees. The Board held, inter alia, that the level of violence was isolated and remote from the election. See also Exeter Packers, Inc. (1983) 9 ALRB No. 76 (field rushing incidents 3 weeks before the election, accompanied by thrown rocks, dirt clods, and tomatoes, were remote). Unlike Gubser, the strikers' threats and misconduct here occurred within days of the election and were directed at a large group of nonstriking employees.

Other ALRB cases have held that field rushing incidents

generally directed towards nonstriking employees where objects such as garlic, tomatoes, dirt clods, and/or rocks have been thrown, have not created an atmosphere of fear or coercion under the specific circumstances of those cases. See Vessey Foods, Inc. (1982) 8 ALRB No. 28; Exeter Packers , Inc ., supra, 9 ALRB No. 76; Frudden Enterprises, Inc., supra, 7 ALRB No. 22. However, in two of those cases (Vessey Foods, and Exeter Packers), the IHE or Board focused upon the fact that the strike activity occurred prior to the union being called in, and in all three cases, the misconduct was held not to be related to the voting process and therefore not to have had any coercive impact upon the employees' free choice of representative. This latter conclusion is based upon the reasoning in Hickory Springs Mfg. Co. (1978) 239 NLRB 64.1 [99 LRRM 1715] that, in order to set aside an election, statements or conduct must not only be coercive, but also must be related to the election so as to have a probable effect on the employees' actions at the polls. This reasoning was rejected by the NLRB in Home Industrial Disposal Service (1983) 266 NLRB 100 [112 LRRM 1257]. Although in the latter decision, the threat was made by a union official, the NLRB ' s reasoning in that case applies here. Threats made in the context of a strike that is not yet related to a union organizing drive do not lose their coercive character as threats merely because the nature of the employees' concerted activity changes into a union campaign. As the Court of Appeals stated in Hickory Springs Manufacturing Co. v. NLRB (5th Cir. 1981) 645 F. 2d 506, 510:

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> Men judge what others will do on given occasions by their prior actions and, less reliably, doubtless, by their statements about their intended future actions. So they assess what kind of folk they are dealing with and how those folk are likely to react if crossed. Even the implicit threat of *a* club or pistol on the hip, without more, may be sufficient to influence significantly the conduct of those who are cast in company with the bearer. In short, we reject the view that such pervasive threats of violence as these can be said, in effect as a matter of law, not to have created a coercive atmosphere sufficient to contaminate the election because they were merely conditional ones.

In this case, although the Union had no presence at Ito & Sons at the time the strikers engaged in the field misconduct, the threats to beat up nonstrikers or call the INS nevertheless were aimed at coercing nonstrikers to join the strike. Shortly after the threats were made these same strikers became the support group behind the union campaign. Indeed, the strike served as the basis for an expedited 48-hour election. It would be unreasonable to believe that the intimidation resulting from the strikers' threats would change or lessen merely because the objective of the strike changed within the short span of a few days from seeking a pay increase to voting for a union representative (which would negotiate the same pay increase). (See also Ciervo Blanco, Inc., supra, 211 NLRB 578.)

In any event, to the extent that Exeter Packers, Vessey Foods, or Frudden Enterprises would stand for the proposition that rock throwing or threats of beatings directed at a large portion of the work force near the time of the election is minimal violence insufficient to establish an atmosphere of fear or coercion, we reject such proposition. It is clear that threats

of physical beatings are aggravated misconduct that reasonably tend to be coercive. Where, as here, the threats are widespread, repeatedly made, directed at a large portion of the work force, and accompanied by acts of violence, an atmosphere of coercion has been established.

A final issue concerns whether the threats to call INS were coercive. In Takara International, Inc. (1977) 3 ALRB No. 24, UFW adherents threatened to call the INS if the union lost the election. Although no raids had occurred in the month preceding the threats, 30 to 40 percent of the work force was undocumented. When rumors of the threat spread throughout the work force, other UFW supporters attempted to reassure the undocumented workers that they would not be reported. The Board found persuasive the NLRB's decision in Mike Yurosek & Sons (1976) 225 NLRB 148 [92 LRRM 1535], in which the national board stated that similar threats by union adherents were not so aggravated in character as to justify setting aside the election. After noting that union supporters in that case tried to reassure the undocumented workers, the NLRB stated that "illegal aliens naturally experience some fear of detection and deportation as a consequence of their unauthorized presence in the U.S., and we doubt that the threats and rumors herein, considering their source, so exacerbated these fears as to render any illegal alien employee incapable of exercising a free choice in the election."

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(225 NLRB at 150.)[16/] The Board in Takara International, Inc. acknowledged that threats of deportation are highly destructive and not to be condoned. However the threats were not part of a union policy to threaten workers, no raids had occurred within the month, and there was no campaign of fear. The Board stated that unfortunately undocumented workers always live in fear but no showing had been made that their fears were worsened by the threats.[17/]

We are not persuaded by the logic of the NLRB in Mike Yurosek & Sons, Inc., supra, 225 NLRB 148, or our Board's similar reasoning in Takara International, Inc., supra, 3 ALRB No. 24, that such threats have less coercive effect on undocumented workers because they already live in fear of deportation. However, in this case, even though there was a lack of evidence concerning how many workers were undocumented,[18/] the threats

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[16/]The NLRB distinguished its decision in Westside Hospital (1975) 218 NLRB 96 [89 LRRM 1273] where it set aside an election because a union organizer, rather than union supporters, threatened to deport *a* Mexican worker who was the chief spokesperson for 16 coworkers.

[17/]See also Kawano, Inc. (1977) 3 ALRB No. 25 (raids occurred frequently; for employees, "deportation was a fact of life," and the INS needed no assistance identifying undocumented workers). Compare Member Johnson's dissent in Takara International that the threat of deportation strikes at the heart of an undocumented worker's liberty and economic security: "If an illegal is led to believe that he could lessen his chances of deportation by voting for a particular party, it is not unreasonable to expect he would do so."

[18/]Without any estimate or evidence as to how much of the work force is undocumented, it is difficult to determine whether the threats to call the INS had a coercive effect upon the workers in the field or those waiting in line to vote. (See

(fn. 18 cont. on p. 22.)

to call the INS were continually made in conjunction with threats of physical beatings. It is therefore apparent that when the threats regarding the INS and job loss were made at the voting site, the workers who heard such threats would continue to associate those threats with the previously stated threats of physical beatings. Since the INS threats were made in connection with campaigning for the union while workers were waiting to vote, we find the INS threats, in this context, to be coercive and, when considered cumulatively with the other misconduct, grounds for setting aside the election.[19/]

ORDER

By authority of Labor Code sections 1160.3 and 1156.3, the Agricultural Labor Relations Board hereby orders that the complaint in this matter is hereby dismissed in its entirety, that the certification issued in T. Ito & Sons Farms (1983)

(fn. 18 cont.)

J. Oberti, Inc. (1984.) 10 ALRB No. 50, IHED at p. 142.) In this case, there was testimony from witnesses that the INS raided during the week before the strike began. Testimony from workers established that when the INS arrived at the field, "some" (unspecified number) of workers ran and "some" (unspecified number) were apprehended.

[19/]Member Henning characterizes our Decision as an "ivory tower" approach to strike elections. That term would be appropriate only if we were willing, as Member Henning would have us be, to tolerate threats of physical beatings and calling the Immigration and Naturalization Service, and only if we were willing to overlook the coercive nature of such threats and their inconsistency with a basic purpose of the Act, i.e., that elections be conducted in an atmosphere free of fear and coercion.

9 ALRB No. 56 is hereby vacated, and that the Petition for Certification in this matter is hereby dismissed.[20/]

Dated: December 23, 1985

JYRL JAMES-MASSENGALE, Chairperson

JOHN P. McCARTHY, Member

JORGE CARRILLO, Member

[20/]Member Henning, in dissent, questions the professional accountability of two members in the majority because we today join in setting aside the election when previously we either joined or failed to dissent to the certification of the UFW. Regardless of what our positions were in the underlying representation case, the fact remains that we now do not believe that the election was conducted in an atmosphere that was free from fear and coercion. The reasons for our change in position are irrelevant to the question of whether our present position is correct, the basis for the latter being amply explained in our Decision. It is unnecessary for us to engage in a discussion of our deliberative process in order to justify our present views. Furthermore, we decline to put more emphasis, as Member Henning does, on achieving a sense of finality in our Decisions than is put upon our primary goal of ensuring that employees vote in an atmosphere free of fear and coercion. (Cf. J. R. Norton (1979) 26 Cal.3d 1.)

MEMBER WALDIE, Dissenting:

I regret the majority's decision to adopt Subzero Freezer Co. Inc. (1984) 271 NLRB No. 7 [116 LRRM 1281]. As *I* stated earlier this year in my dissent in Adamek & Dessert, Inc. (1985) 11 ALRB No. 8, this recent NLRB case should not be adopted without careful reasoning and a full understanding of its ramifications. The majority provides neither, and I remain unconvinced that we should adopt it.

In its worst scenario, Subzero allows for identical Board members to re-examine the same record, with no new evidence whatsoever, and come to a different conclusion, reversing their earlier decision. That is precisely what has happened here, without any explanation whatsoever as to why the record today looks different than it did in 1983.

Nor am I comforted by the majority's inference that Subzero is but a limited exception to a still to be followed rule against relitigation of election issues in a ULP proceeding. If

the exception can be used, as here, to justify a different conclusion by the same Board members, the door is ajar for full entry and reconsideration by new Board members, who may also conclude that an employer is being required "to bargain with a union that has not attained the status of majority representation from a free and fair election." (Subzero, supra, slip. op. at p. 3.) The rule will be swallowed by the exception, as should become evident in the months ahead.

By adopting Subzero, the majority lengthens further the post-election period of uncertainty regarding certification and partially negates the progressive intent of the legislature in adopting section 1156.3 of the Agricultural Labor Relations Act (Act), to prevent the delays in election objection resolution that have so plagued the NLRB. (See Boire v. Greyhound Corp. (1964.) 375 U.S. 478 [quoting H.R.Rep. No. 972, 74th Cons., 1st Sess. 5]; Raley's Inc. v. NLRB (9th Cir. 1984.) 725 F. 2d 1204, 1207 [115 LRRM 2933]; Weiler, Promises to Keep: Security Workers' Rights to Self Organization Under the NLRA, (1983) 96 Harv.L.Rev. 1795, 1769-1803.) Abandoning the policy against relitigation will, naturally, encourage employers to ignore this Board's certification decision and relitigate the issues yet again, and to do so with virtually no concern that makewhole will be awarded against them if they are unsuccessful. After today's decision, can it ever be argued that an employer is "unreasonable" in attempting to change the Board's collective mind, even when it simply reargues the same record before the same members? It is bad policy to abandon the nonrelitigation rule; it is bad law to virtually eliminate a

statutory remedy in these cases.

This case is also noteworthy for the zeal with which the General Counsel, both in his complaint and in his brief before this Board, defends the Respondent while attacking the Charging Party as well as his own employees. For example, paragraph 10(c) of his complaint "alleges," in part:

> . . . in light of the tenuous, superficial, hasty and biased manner in which the determination of this issue was made by the board agents, which resulted in an expedited election, thus critically denying the employer any time or reasonable opportunity to campaign against the Petitioner, it is indeed not unreasonable for the employer to question and oppose the Board's resolution of this objection.

And paragraph 11 "alleges," in part:

> ... General Counsel was unable to find evidence or law to justify or support the inclusion of an allegation - of or prayer for makewhole. The General Counsel believes there is insufficient evidence to enable him to make a prima facie finding that respondent is in other than good faith in refusing to bargain with Petitioner.... Therefore General Counsel not only does not include within this complaint an allegation of or prayer for makewhole, but will actively oppose any request for and/or a finding or imposition of makewhole herein.

Continuing to champion Respondent's cause here, the General Counsel argues in his brief to the Board that his own inexcusable delay in investigating the charge should relieve Respondent of makewhole.

One is tempted to wonder if the General Counsel has any understanding of his duty to the Charging Party and his responsibilities as a prosecutor. The increasing disenchantment of farm workers with the prospects of obtaining relief for violations of the Act from this administration would seem to have considerable

substance judging from the General Counsel's aggressive representation of the interest of the Respondent in this case.

Dated: December 23, 1985

JEROME R. WALDIE, Member

MEMBER HENNING, Dissenting:

Today, the majority of this Board sabotages one purpose and policy of the Agricultural Labor Relations Act (ALRA), to bring a sense of stability to agricultural labor relations by promoting collective bargaining. While giving lip service to the well-settled principle that in the absence of newly discovered or previously unavailable evidence, a respondent may not relitigate issues that were or could have been litigated in a prior representation proceeding (see Pittsburgh Glass Co. v. NLRB (1941) 313 U.S. 14.6, 162), the majority proceeds to create a broad exception to this clear proscription. [1/] The majority's myopic approach in this case will serve only to promote instability and

[1/] As discussed below, the majority relies on Subzero Freezer Co., Inc. (1984) 271 NLRB No. 7 [116 LRRM 1281] as authority for its sweeping change in past practice and precedent. However, the National Labor Relations Board (NLRB or national board) continues to adhere to this principle even after its decision in Subzero, supra. (See Dickerson Florida, Inc. (1984) 272 NLRB No. 4 [117 LRRM 1195] .)

uncertainty and to shatter the hopes and aspirations of farmworkers who, having waited years for the Board to certify their freely elected collective bargaining representative, are today deprived of representation. Those employees cannot, in the foreseeable future, have their representative bargain with their employer concerning their wages, hours and other terms and conditions of employment, a right guaranteed them by the ALRA.

The majority's decision is premised on "the exception" established in Subzero Freezer Co., Inc., supra, 271 NLRB No. 7. However, nowhere in its decision does the majority explain what the "exception" is. In Subzero, supra, the NLRB vacated its previous certification and dismissed a complaint alleging a refusal to bargain.[2/] The dismissal was based on the dissenting position of two members in the certification case who concluded that an atmosphere of fear and coercion rendered a fair election impossible. Member Zimmerman filed a strong dissent expressing his concern that stability in law and finality in litigation should not be sacrificed merely because of a change in the composition of the Board.

The glaring differences between Subzero, supra, 271 NLRB No. 7, and the instant case cannot be masked behind the majority's casual reference to the Subzero "exception." In the instant case, two members of the new majority participated in this Board's representation Decision, but were probably not

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[2/] The case came before the national board by way of a Motion for Summary Judgement. Section 10282 of the NLRB's Casehandling Manual establishes this procedure for technical refusal to bargain cases where no factual issues warranting a hearing exist.

concerned enough about conduct complained of by Respondent to file a dissent. Unlike the Subzero case, no dissent was filed in the representation Decision in this matter. And yet, members of this Board today decide to relitigate election issues and reconsider the underlying representation case which they themselves conclusively decided over two years ago. Such an action is indefensible. It cannot be supported by wisdom or even logic. The facts of the case have not changed. The law has not changed. With the exception of one Board member, the composition of the Board has not changed. Yet, my colleagues now conclude that the election was conducted in an atmosphere of fear and coercion. A reversal of Board precedent occasioned by a change in the composition of the Board can be expected and the resulting degree of instability in Board law must be properly tolerated. However, it is not too much to expect some degree of professional accountability by members of this Board so that our decisions, especially those certifying a bargaining representative, exhibit a sense of finality.

Aside from the "policy" reasons for distinguishing the instant case from Subzero, several factual distinctions are also noteworthy. In this case, the workers overwhelmingly voted for union representation by a vote of 212 to 121. This is in sharp contrast to Subzero where the margin of victory was a mere 2 votes (36 to 34). In addition, it is undisputed that the alleged threats in the instant case were made by employees well before any union

involvement *in* the organizational drive.[3/] This was not the case in Subzero. Finally, we cannot ignore the special procedure for strike elections embodied in the ALRA. By the very nature of strike situations, tempers and emotions run high and words become heated. The majority's ideal of achieving a pristine election campaign is admirable but not achievable. It reflects an "ivory tower" approach to strike elections which effectively rewrites the ALRA and will result in the setting aside of an inordinate number of elections. The Legislature chose to establish an expedited election procedure in strike situations as a means of quickly moving the parties from that potentially volatile condition to the bargaining table. This legislative decision should be honored, not ignored or second-guessed.

For all the foregoing reasons, I dissent.[4/]

Dated:. December 23, 1985

PATRICK W. HENNING, Member

[3/]While the majority acknowledges that misconduct of nonparties is given less weight than that of parties, it nonetheless appears to attribute retroactive agency status to the union supporters.

[4/]I unconditionally condemn threats of violence and believe that employees should exercise their right to vote for or against union representation in an atmosphere free of fear and/or coercion. I strongly encourage my colleagues to closely scrutinize allegations of threats and violence in representation cases. However, I firmly believe that that review must be undertaken before we certify the union and not years later in an unfair labor practice proceeding. We need not compromise our concerns for untainted elections and for achieving a sense of finality and stability in our Decisions, as both are of equal import. Both concerns can and should be accommodated.

CASE SUMMARY

T. ITO & SONS FARMS

11 ALRB No. 36
Case No. 83-CE-20O-EC

In T. Ito & Sons Farms (1983) 9 ALRB No. 56, the Board dismissed all of Respondent's objections to the election and certified the United Farm Workers of America, AFL-CIO (UFW) *as* the exclusive bargaining representative of Respondent's employees. After the UFW requested Respondent to meet and bargain, Respondent refused to do so in order to seek court review of the validity of the UFW's certification. The parties stipulated to the essential facts and submitted this case directly to the Board.

The Board, in its review, noted that although both the NLRB and ALRB generally prohibit the relitigation of representation issues in a technical refusal-to-bargain proceeding, an exception exists where the underlying election was conducted in an atmosphere of fear or coercion. In this case, the Board reviewed the facts and concluded that the underlying election was in fact conducted in such an atmosphere of fear and coercion. The Board found that during the days preceding the election, striking employees threatened large groups of employees with physical beatings and calling the Immigration and Naturalization Service (INS); the threats were accompanied by acts of physical force (strikers held rocks in their hands while making threats, blocked vans carrying workers out of the fields, and punctured the tires of one of the nonstrikers; in addition, one striker swung a stick at the general manager in front of a large number of workers); and, during the election, groups of union supporters who were continually campaigning among workers waiting in line, threatened them with job loss or calling the INS if they did not support the union. The Board concluded that such misconduct, even though engaged in by only workers or union supporters, rather than by the union or its agents, constituted aggravated misconduct, and was grounds to set aside the election.

Dissenting Opinions

Member Waldie dissents. In his view, this Decision erodes the statute's intention to promptly resolve election issues, frustrates workers' attempts to achieve the beginnings of a ' bargaining relationship with their employer, and virtually eliminates the statutory provision of makewhole in such refusals to bargain.

Member Henning vigorously dissents from the majority's Decision to adopt the NLRB's Subzero decision and again review the merits of Respondent's election objections. He believes the Board should carefully scrutinize allegations of threats or violence when it is reviewing the representation case, and not years later in the course of reviewing an unfair labor practice proceeding. Member Henning faults the majority for failing to accord a sense

of finality to the Board's Decisions and for depriving Respondent's workers of the right to union representation which this same Board awarded them two years ago.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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